**CHIU WING WA @ CHEW WENG WAH & 3 ORS**

**v.**

**ONG BENG CHENG**

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK GUNN CHIT TUAN CJ (MALAYA),
TAN SRI DATO' HAJI MOHD. AZMI BIN DATO' HAJI KAMARUDDIN SCJ,
DATUK WIRA L.C. VOHRAH J.
[CIVIL APPEAL NO. 02-345-93]
18 NOVEMBER 1993

***LANDLORD AND TENANT: Rent controlled premises - Failure to endorse under s. 267 (2) NLC - Whether fatal for protection under Control of Rent Act. ('the Act').***

***PRACTICE AND PROCEDURE: Application for vacant possession by originating summons - Tenants not trespassers - Whether action should have been commenced by writ.***

***STATUTORY INTERPRETATION: Construction of statutes - Two separate and distinct protections given by different Acts - Whether there was conflict - Rule of harmonious construction - Whether mutually exclusive provisions.***

The respondent was a successful bidder of certain properties at a public auction conducted under the National Land Code pursuant to a foreclosure order. A certificate of sale in Form 16F of NLC was issued to the respondent. The appellants were tenants of the previous owner of the premises and were in occupation of the premises which were sold subject to all rights and liabilities existing thereon. The respondent terminated the monthly tenancies by separate notices to quit on all the appellants and demanded delivery of vacant possession. When the appellants failed to comply with the said notices, the plaintiff filed an application by originating summons for vacant possession which was granted by the trial Judge. The appellants appealed.

The main arguments raised by the appellants against the order of vacant possession are:

(a) the proceedings by way of originating summons without reference to O. 89 of Rules of High Court 1980 were wrong in law and the action ought to have been commenced by writ; and

(b) the failure to endorse the monthly tenancies on the register documents of title under s. 267(2) of the NLC was not fatal and as such the appellants were not trespassers but continued to enjoy the protection of the Act.

**Held:**

**[1]** Although the Court is entitled to treat the respondent's originating summons as one under O. 89 RHC so as to remedy the procedural defect, it does not follow in this case that the Court is relieved from its duty to consider the further question of whether the tenants are trespassers pure and simple for which the summary procedure under O. 89 has been specially introduced or whether they are tenants holding over either from the previous or present landlords after the termination of the tenancy. If the appellants are tenants holding over after termination of the monthly tenancy by the notice to quit, then O. 89 is inapplicable. The summary procedure under O. 89 of the RHC should not be allowed to apply where the entry to the land in the first instance is lawful, for in such a situation, there must necessarily be triable issues on the facts and the law for determination of evidence *viva voce*. In the circumstances, the application by originating summons although remedied by the trial Judge to one under O. 89 RHC should be dismissed as there are triable issues of facts and law, and as such the application for vacant possession ought to have been commenced by writ.

**[2]** There is no conflict between the NLC and the Act. The rule of harmonious construction should be applied in view of the two distinct protections made available by separate legislation for different purposes; one generally given to tenancies exempted from registration under the NLC which requires endorsement under s. 267 (2) and the other specially given to tenants of controlled premises under the Act. They are not mutually exclusive but run parallel to each other.

**[3]** There is nothing to suggest that the protection given by the Act is unenforceable

unless the tenancy exempt from registration is doubly protected by endorsement under s. 267 (2) of the Code. For purposes of eviction of occupiers of controlled premises, the Act must be complied with notwithstanding failure to comply with any provision of the NLC. Under the Act, the right to protection against eviction does not necessarily depend on the existence of a tenancy under the NLC.

*[Appeal allowed with costs].*

**[Bahasa Malaysia** Translation of Headnote]

***TUANTANAH DAN PENYEWA: Premis kawalan sewa - Kegagalan untuk mengindorskan di bawah s. 267(2) KTN - Sama ada kekal bagi perlindungan di bawah Akta Kawalan Sewa.***

***AMALAN DAN PROSEDUR: Permohonan bagi milikan kosong melalui saman pemula - Penyewa bukan penceroboh - Sama ada tindakan sepatutnya dimulakan melalui writ.***

***PENTAFSIRAN STATUTORI: Pentafsiran statut - Dua perlindungan yang berasingan dan berbeza diberikan oleh Akta-akta yang berlainan - Sama ada terdapat percanggahan - Kaedah pentafsiran yang seragam - Sama ada peruntukan eksklusif yang sama.***

Responden ialah penawar-beli yang berjaya membeli beberapa harta dilelongan awam yang dijalankan di bawah KTN menurut suatu perintah halang tebus. Perakuan jualan dalam Borang 16F KTN telah dikeluarkan kepada responden. Para perayu ialah penyewa-penyewa tuan punya premis tersebut sebelum ini dan menduduki premis tersebut yang telah dijual tertakluk kepada segala hak dan liabiliti yang wujud ke atasnya. Responden menamatkan penyewaan bulanan melalui notis-notis untuk keluar yang berasingan yang disampaikan kepada kesemua perayu dan menuntut penyerahan milikan kosong. Apabila para perayu gagal untuk mematuhi notis-notis tersebut, plaintif telah memfailkan suatu permohonan melalui saman pemula untuk milikan kosong yang diberikan oleh Hakim perbicaraan. Para perayu membuat rayuan.

Hujah-hujah utama yang dibangkitkan oleh para perayu terhadap perintah milikan kosong ialah

(a) prosiding melalui saman pemula tanpa merujuk kepada Aturan 89 Kaedah-Kaedah Mahkamah Tinggi 1980 (KMT) adalah salah dari segi undang-undang dan tindakan tersebut sepatutnya dimulakan melalui writ dan

(b) kegagalan untuk mengindorskan sewa bulanan pada daftar dokumen hakmilik di bawah s. 267(2) KTN tidaklah kekal dan oleh yang demikian para perayu bukanlah merupakan penceroboh tetapi terus menikmati perlindungan Akta tersebut.

**Diputuskan:**

**[1]** Walaupun Mahkamah berhak untuk menyifatkan saman pemula responden sebagai sesuatu yang di bawah A. 89 KMT bagi membetulkan ketidaksempurnaan prosedur, ia tidaklah begitu dalam kes ini dimana Mahkamah dilepaskan daripada kewajipannya untuk menimbangkan soalan-soalan selanjutnya sama ada penyewa-penyewa merupakan penceroboh semata-mata bagi mana prosedur ringkas di bawah A. 89 telah diperkenalkan dengan khusus atau mereka adalah penyewa yang memegang daripada tuantanah yang dahulu atau yang sekarang selepas penamatan penyewaan tersebut. Jika para perayu dan penyewa yang memegang selepas penamatan penyewaan bulanan melalui notis untuk keluar, maka A. 89 KMT adalah tidak terpakai. Prosedur ringkas di bawah A. 89 KMT tidak harus dibenarkan untuk terpakai di mana kemasukan ke tanah tersebut pada kali pertama adalah sah, kerana dalam keadaan sedemikian mestilah terdapat isu-isu yang boleh dibicarakan atas fakta-fakta dan undang-undang bagi penentuan keterangan *viva voce*. Dalam keadaan ini, permohonan melalui saman pemula walaupun dibetulkan oleh Hakim perbicaraan kepada sesuatu yang di bawah A. 89 KMT haruslah ditolak memandangkan terdapatnya isu-isu fakta dan undang-undang yang boleh dibicarakan, dan dengan itu permohonan bagi milikan kosong sepatutnya dimulakan melalui writ.

**[2]** Tiada percanggahan di antara KTN dan Akta tersebut. Kaedah pentafsiran

yang sama haruslah terpakai melihatkan kepada dua perlindungan yang berbeza yang diperuntukkan oleh perundangan yang berasingan bagi tujuan-tujuan yang berbeza; salah satunya secara umum diberikan kepada penyewaan yang dikecualikan daripada pendaftaran di bawah KTN yang menghendaki pengindorsan di bawah s. 267(2) dan yang satu lagi itu secara khusus diberikan kepada penyewa-penyewa premis kawalan sewa di bawah Akta tersebut. Mereka tidaklah eksklusif secara bersama tetapi selari antara satu sama lain.

**[3]** Tiada apa untuk mencadangkan bahawa perlindungan yang diberikan oleh Akta tersebut tidak boleh dikuatkuasakan melainkan penyewaan yang dikecualikan daripada pendaftaran dilindungi di bawah s. 267(2) Kanun tersebut. Bagi tujuan pengusiran penduduk-penduduk premis kawalan sewa, Akta tersebut perlulah dipatuhi meskipun terdapat kegagalan untuk mematuhi mana-mana peruntukan KTN. Di bawah Akta tersebut, hak kepada perlindungan terhadap pengusiran tidak semestinya bergantung kepada kewujudan sesuatu penyewaan di bawah KTN.

*[Rayuan dibenarkan dengan kos].*

**Cases referred to:**

*McPhail v. Persons, Names unknown, [1973] 3 AER 393* ***(cit)***

*Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd. [1991] 1 MLJ 221* ***(cit)***

*Leong Yoong v. Lee Sem Yoong [1968] 2 MLJ 72* ***(cit)***

*Public Bank Berhad. v. Wan Leong Hup Kee Co. [1992] 2 CLJ 1070* ***(not foll)***

*European Asian Bank AG v. Punjab and Sind Bank [1983] 2 AER 508* ***(refd)***

*Duport Steels Ltd v. Sirs [1980] 1 AER 529* ***(cit)***

*Quinn v. Leathem [1901] AC 495* ***(foll)***

*Chop Soon Hoe v. Tan Kee [1976] 1 MLJ 172* ***(foll)***

*Richardson v. Bardenhagen Enterprise Pty. Ltd. [1971] Tas SR 307* ***(foll)***

**Legislation referred to:**

Control of Rent Act 1966, ss. 16, 18 & 19

National Land Code 1965, ss. 4 (2), 213(1)(a), 223, 234, 235, 267(2) & 316(1)

Rules of the High Court 1980, O. 89(1)

*For the appellants - Gerald Peter Samuel; M/s. Presgrave & Matthews*

*For the respondents - B. Thangaraj; M/s. Thangaraj & Associates*

**JUDGMENT**

**Haji Mohd. Azmi bin Dato' Haji Kamaruddin SCJ:**

This is an appeal by the monthly tenants of premises nos. 1, 3, 5 and 7, Carnarvon Lane, Pulau Pinang, against the order of vacant possession and damages given by Mr. T. Selventhiranathan, JC, on 14 June 1993. The four premises are situated on two separate lots Nos. 523 and 524, (G. 38460 and G. 38467), Pecahan Bandar 22, Daerah Timur Laut, Pulau Pinang. The plaintiff (respondent before us) is a successful bidder of the properties at a public auction conducted under the National Land Code on 6 January 1992, pursuant to a foreclosure order obtained *vide* Kuala Lumpur High Court Originating Summons No. F 1224 of 1985. A certificate of sale in Form 16F of the National Land Code was issued to him on 25 March 1992, and on 28 July 1992 through his solicitors, he terminated the monthly tenancies by separate notices to quit on all the four defendants, and demanded delivery of vacant possession by 31 August 1992. When the defendants failed to comply with the said notices, the plaintiff filed an application by originating summons for vacant possession which was granted by the learned Judicial Commissioner. Hence the present appeal.

In this appeal, both parties agree that the premises in question are pre-war double storey terrace houses, and are controlled premises under the Control of Rent Act 1966 (hereinafter referred to as "the Act"). This fact was clearly within the knowledge of the plaintiff at all relevant times, as it was so stated in the proclamation of sale of the public auction. It has never been seriously challenged that the plaintiff knew at the time of the auction sale, that he was purchasing rent controlled premises, and as such it is contended by the appellants that as monthly tenants of the previous landlords of the controlled premises they enjoy the protection under s. 16 of the Act notwithstanding the termination of the tenancies by the notices to quit.

The main argument raised by the appellants against the order of vacant possession in the court below and repeated be-

fore us is two-fold. The first is procedural. It is contended that the proceedings by way of Originating Summons without reference to O. 89 of RHC 1980, are wrong in law. As the premises are controlled premises under the Act, the appellants argue forcefully that the action ought to have been commenced by writ. The second issue is one of law which concerns the effect of non-compliance with s. 267(2) of the National Land Code 1965 (hereinafter referred to as "NLC") on the protection against eviction conferred by the Act, on tenants of controlled premises. The appellants contend that failure to endorse the monthly tenancies under the NLC is not fatal under the Act, and as such they are not trespassers but continue to enjoy the protection of the Act.

On the first issue it must be emphasised at this stage that despite the protestation of counsel for the respondent, the learned Judicial Commissioner has treated the respondent's application as one under O. 89 RHC 1980, so as to enable the Court to remedy the procedural defect and grant the prayer for vacant possession summarily on affidavit evidence. At p. 32 of his grounds of judgment, the learned Judicial Commissioner made the following findings:

> For the reasons stated above, I found that the defendants were trespassers as no relationship of landlord and tenant had been created between the plaintiff and them. The defendants were persons who remained in occupation of the premises without the licence or consent of the plaintiff and from 1 September 1992 (the day following the date of which they were required to quit and deliver vacant possession of the premises by the notice dated 28 July 1992), they became trespassers against whom the plaintiff was entitled to apply by way of summary proceedings for vacant possession under O. 89.

Although it may be successfully argued that the court is entitled to treat the plaintiff's originating summons as one under O. 89 RHC, notwithstanding any objection by the plaintiff, it does not follow in this case that the court is relieved from its duty to consider the further question of whether the tenants are trespassers pure and simple for which the summary procedure under O. 89 has been specially introduced, or whether they are tenants holding over either from the previous or present landlords after the termination of the tenancy. The distinction is relevant for the purpose of O. 89 (1) RHC which provides:

> Summary Proceedings For Possession Of Land
>
> 1. Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.

The words in the parenthesis are crucial. If the appellants are tenants holding over after termination of the monthly tenancy by the notice to quit, then O. 89 is inapplicable. It should be noted that O. 89 has its origin in O. 113 of the English Rules, and the principle behind *McPhail v. Persons, Names Unknown* [1973] 3 AER 393 is clearly to limit the operation of the summary procedure of 1989 to trespassers pure and simple, whether known or unknown. In our view, the summary procedure should not be allowed to apply where the entry to the land in the first instance is lawful, for in such a situation, there must necessarily be triable issues on the facts and the law for determination by evidence *viva voce*. In this connection we approve the judgment of Wan Adnan J. in *Hotel Ambassador (M) Sdn. Bhd. v. Seapower (M) Sdn. Bhd.* [1991] 1 MLJ 221 as discussed by Edgar Joseph Jr. J. (as he then was) at p. 224, and upheld by the Supreme Court in (1991) 1 MLJ 404.

As contained in the proclamation of sale, the properties are sold "subject to all easements, liabilities and rights (if any) subsisting thereon", and when buying rent controlled premises in Penang, the respondent ought to know that the chances are that he is purchasing them without vacant possession. Thus, it is the standard and accepted practice for valuers to depress the market value of rent controlled premises for the purpose of fixing the reserved price in any auction. Therefore

it does not seem right to allow a successful bidder under the NLC to obtain more than what he has bargained for at the expense of the protected tenants and also that of the chargor. It should be observed that the respondent is able to purchase the Penang properties for a mere sum of RM141,000 in January 1992.

The summary procedure under O. 89 is governed by the same principles as those under O. 14 RHC 1980. To entitle a defendant to a trial, all he need to do is to show that there is a triable issue of law or fact. It is only in clear cases of trespassing that a summary order can be made under O. 89. The learned Judicial Commissioner did not seem to address his mind sufficiently to the importance of determining the existence or absence of triable issues. It is unfortunate that the learned Judicial Commissioner did not give due consideration to the Federal Court decision of *Leong Yoong v. Lee Sem Yoong* [1968] 2 MLJ 72 (cited to him in argument) where it was held that where reliance is placed on the provision of the Rent Control Act to avoid eviction by landlord, all that the tenant has to do is to show that he is a protected tenant under the Act. In the circumstances, the application by originating summons although remedied by the learned Judicial Commissioner to one under O. 89 RHC should be dismissed as there are triable issues of fact and law, and as such the application for vacant possession ought to have been commenced by writ.

On the second issue, the basis of the learned Judicial Commissioner's opinion on s. 267(2) of the NLC is *Hotel Ambassador (M) Sdn. Bhd, v. Seapower (M) Sdn. Bhd.* [1991] 1 MLJ 221 which was upheld on appeal in [1991] 1 MLJ 404, and also the case of *Public Bank Berhad v. Wan Leong Hup Kee Co.* [1992] 2 CLJ 1070. It is also based on the learned Judicial Commissioner's interpretation of s. 4(2) NLC which according to him has the effect of repealing or modifying s. 16 of the Act in relation to s. 267(2) of the Code.

It is not disputed that the two register documents of title to the properties do not reveal any endorsement of claim under s. 316(1) NLC pertaining to "tenancy exempted from registration" as defined under s. 213 (1) (a), i.e. "any tenancy or subtenancy for a term not exceeding three years granted pursuant to s. 223". The triable issue of law in this case is whether it is the intention of Parliament that a tenant of rent controlled premises protected under the Act cannot enjoy or should cease to enjoy such protection and become a trespasser if there is non-compliance with s. 267(2) of NLC as to endorsement of the monthly tenancy. For such a complex and arguable question of law, we do not think that it should be disposed of summarily within the principle enunciated in *European Asian Bank AG v. Punjab and Sind Bank* [1983] 2 AER 508 at 516. Where the issue raised is solely a question of law which is readily unarguable without reference to any fact, or where the facts are clear and undisputed, the court should of course, exercise its duty to grant a summary order under O. 89. For reasons which we will discuss later, *Hotel Ambassador* case is no authority for the legal propostion laid down by the learned Judicial Commissioner. Be that as it may, since the learned Judicial Commissioner had decided to dispose of the legal issue summarily, we are forced to consider whether his conclusion is supported by the authorities relied upon.

According to the grounds of judgment of the learned Judicial Commissioner, the stand taken in the court below by Mr. Chong Woon Khoon, Counsel for the 1st and 2nd defendants, and adopted by Mr. See Ewe Lin for 3rd and 4th defendants, was as follows:

> He contended that the provisions of the Rent Control Act run parallel to Part Fifteen, chapter 1 of the Code. In his view s. 225(1)(a) of the Code expressly provides for the exclusion of the Code and makes provision for the operation of the Act. There was no need for the first and second defendants to register their interest which arose by way of operation of law as it would be "ridiculous to give a right on the one hand under the Control of Rent Act 1966 and taken that away under the National Land Code 1965". Sections 16 and 18 of the Act protected the tenant and the landlord could only recover vacant possession if he complied with s. 18.

Section 18 did not penalise the tenant or failure to register his interest. Where there was a conflict between a general law and a specific law, the specific law should prevail. In the present case the general law was the Code, and the specific law was the Act which related specifically to controlled premises under the Act. The latter law should therefore prevail.

On the other hand Mr. Thangaraj, for the plaintiff (respondent before us), took the position that there was no conflict between the two laws. According to him the issue was on priority, as to who had the prior right: a purchaser of the property at a public auction or a tenant of the premises. Relying entirely on the authority of the Supreme Court in *Hotel Ambassador*, he contended that the plaintiff's application was not under O. 89 but was an exercise of power of forfeiture of the monthly tenancy under s. 234 of the NLC, for breach of the provision of s. 267(2).

There is no conflict between the NLC and the Act, but not in the way suggested by Mr. Thangaraj. We are of the opinion that the rule of harmonious construction should be applied in this case, in view of the two distinct protections made available by separate legislation for different purposes; one generally given to tenancies exempted from registration under the NLC which requires endorsement under s. 267(2), and the other specially given to tenants of controlled premises of whatever duration under the Act. They are not mutually exclusive but run parallel to each other.

Apart from the fact that the defendant in *Hotel Ambassador* case had also purchased the property in Penang at a public auction held under the NLC, and also the fact that the defendant had commenced the action by originating summons for possession under O. 89 RHC 1980, the similarity between that case and the instant appeal ends there. It should be emphasised that in *Hotel Ambassador*, the subject matter of the dispute as the name of the case itself suggests was a 11-storey hotel. Sticking out like a sore thumb, the court in that case was not concerned with rent controlled premises. On appeal, the decision of Edgar Joseph Jr. J. (as he then was) whereby he granted the declaration for vacant possession prayed for by the purchaser, was upheld by the Supreme Court. The headnotes of [1991] 1 MLJ 404 states:

> The appellants were the lessees of a property on which they ran the business of a hotel. The lease was for ten years with an option for renewal, at the expiry of the lease, the option for extension was never exercised but the appellants continued occupation of the said property. Subsequently, the property was sold to the respondents by public auction after a foreclosure action by the chargee of the property. The certificate of sale was duly issued by the Senior Assistant Registrar of the High Court. The respondents thereupon applied for possession of the property under O. 89 of the Rules of the High Court 1980 but this application was dismissed in the High Court. The appeal against that order was abandoned.
>
> The appellants later applied for a declaration that they were the lawful tenants of the said property and for a restraining order against the respondents. The restraining order was granted. The respondents then applied to set aside the restraining order and after a hearing *inter partes*, the learned Judge of the High Court discharged the order and also made an order for vacant possession of the property to be given to the respondents. See [1991] 1 MLJ 221. The appellants appealed.

The Supreme Court held *inter alia* that

> (1) The earlier judgment of the High Court dismissing the respondents' claim was confined to the facts before the Court and limited to the proposition that since the occupants claimed that they were tenants holding over, the summary procedure under O. 89 of the Rules of the High Court 1980 was not proper. The question of *res judicata* or issue estoppel did not arise.
> (2) Section 267(2) of the National Land Code 1965 provides that, notwithstanding that it was granted with the consent in writing of the chargee, no tenancy exempt from registration granted by the chargor after the date of registration of the charge shall be binding on the purchaser unless prior to the date of registration of the certificate of sale, the tenancy had become protected by an endorsement on the register document of title.

Thus, in the *Hotel Ambassador* case, both the High Court and Supreme Court were not dealing with rent controlled premises, and were not asked to consider the effect

of the Act. Without any intention of undermining the principle of *stare decisis* as laid down by Lord Scarman in *Duport Steel Ltd. v. Sirs* [1980] 1 AER 529 at 551 (C), it is important that decided cases should not be followed blindly. As stated by Lord Halsbury in *Quinn v. Leathem* [1901] AC 495 at 506:

> Every judgment must be read as applicable to the particular facts proved, since the generality of expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are found.

The other authority relied upon by the learned Judicial Commissioner is *Public Bank Berhad v. Wan Leong Hup Kee Co.* [1992] 2 CLJ 1070, where the charged property sold at a public auction under the NLC had an express provision against the creation of any tenancy, and in the circumstances Haji Abdul Malek J. found that the tenancy was invalid and allowed an order of vacant possession applied for by the successful bidder in an auction sale under the NLC. The case is no authority for the proposition that the protection given by the Act can be ignored if the tenancy exempt from registration under the NLC is not endorsed under s. 267(2).

Further as was held by the Federal Court in the case of *Chop Soon Hoe v. Tan Kee* [1976] 1 MLJ 172, s. 235 NLC deals with tenancy generally, whereas the Act deals specially with controlled premises, and s. 235 (on the requirement of notice before forfeiture), cannot apply to controlled premises which are regulated by the Act. At p. 173, Suffian LP stated:

> With respect, I do not think there is any merit in this argument. Section 235 of the Code deals with tenancies generally, whereas the Control of Rent Act deals specially with controlled tenancies, and I do not think that s. 235 can apply to controlled tenancies which are regulated by the Control of Rent Act. To hold otherwise would be to nullify the provisions of s. 16 (1) (a) of the Act.

Similarly s. 267(2) of NLC is a general provision in respect of tenancies exempted from registration under the Code, whereas the provisions of the Act deal specially with controlled premises.

On the interpretation of s. 4(2) of NLC, the learned Judicial Commissioner in effect held that because of the omission by Parliament to include the Act in the saving provision, the Act is subservient to the NLC, and as such the protection given to tenants of controlled premises under ss. 16, 18 or 19 of the Act, is useless, unless the tenancies (if exempted from registration under the Code) are endorsed under s. 267(2). It should first be observed that the various State and Federal statutes not affected by the provisions of NLC by virtue of s. 4(2) NLC (except insofar as it is expressly provided to the contrary), relate to land or land tenure. There is nothing in the NLC to expressly provide that the Act or any of its predecessors has been amended or has to be read subject to s. 267(2) of NLC with regard to the protection conferred by the Act to all tenants of controlled premises.

In our view, there is no conflict between the two pieces of legislation. The fact that the Control of Rent Act is not included in s. 4(2) NLC does not mean that it is the intention of Parliament to repeal or modify the protection given by the Act to occupiers of rent controlled premises. The Act was enacted subsequent to the National Land Code, and there is nothing in either legislation to indicate that it is the intention of Parliament to favour one protection against the other. The court must therefore give effect to both legislation. We are of the opinion that the provisions of the Act cannot be repealed or amended by implication merely by omission to include the Act under s. 4(2) of NLC. When the Act was enacted in 1966, Parliament must be assumed to know the provisions of the 1965 NLC, and yet there is nothing to suggest that the protection given by the Act is unenforceable unless the tenancy exempt from registration is doubly protected by endorsement under s. 267(2) of the NLC. In our opinion, for purpose of eviction of occupiers of controlled premises, the Act must be complied with notwithstanding failure to comply with any provision of the NLC. Under the Act, the right to protection against eviction does not necessarily depend on the existence of a tenancy under the NLC.

For the respondent's argument to succeed, there must be expressed provision either in the NLC or the Act to exclude the protection given by the Act in case of non-compliance with s. 267(2) of the Code. Where separate protection in favour of the tenant is given by two pieces of legislation, we cannot accept the argument that failure to invoke one right will necessarily revoke the other. Unless the court is legally entitled to assume such revocation by necessary implication, by reason of omission by Parliament to include the Act in s. 4(2) NLC, the Court is not entitled to legislate in that fashion by filling the legislative gap. As stated by Burbury CJ in *Richardson v. Bardenhagen Enterprise Pty. Ltd.* [1971] Tas. SR 307 at 316:

> The dividing line between impermissible filling in of legislative gaps and spelling out by interpretation of a whole statute, something necessarily implied within its expressed language, is sometimes a fine one. Parliament may, of course, express its intention by necessary implication from the words it uses. This principle may often be called in aid where general statutory powers are given and to give effect to the clear legislative purpose incidental powers will be implied. It has been called in aid to introduce by implication the rules of natural justice where a tribunal is given statutory jurisdiction to determine rights. But what is implied must not conflict with the express language of the statute. It must be within it and incidental to it ... Particularly in a penal statute the distinction must steadily be borne in mind between something which is by implication part of what is expressed, and something which, by inference, the Court concludes the legislature has simply failed to provide for or overlooked ... If, by permissible processes of statutory interpretation, the court cannot say that what is omitted is necessarily implied within the language it cannot legislate by filling in gaps which the legislature has left. That proposition applied with particular force to penal statutes.

The Act, and its predecessors are specific social legislation to control rentals of pre-war premises and matters incidental thereto including special provision relating to recovery of possession of controlled premises. Under s. 16, except as prescribed under (a) to (m), "... no order or judgment for the recovery of possession of any controlled premises or any part thereof comprised in a tenancy shall be made or given by the Court".

Parliament has seen it fit to exclude non-compliance with any provision of the NLC, in particular non-compliance with s. 267(2) as one of the exceptions under s. 16. The respondent's case for recovery of possession also does not come under ss. 18 or 19 of the Act. In our opinion the right to protection conferred by the Act cannot come to naught merely because a tenant or an occupier enjoying such right has failed to invoke a separate protection given by another legislation.

For the above reasons, the appeal is allowed with costs, both here and in the Court below. The order of the learned Judicial Commissioner is set aside, and the deposit is refunded to the appellants.